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DUDLEY v. CARTER RED ASH COLLIERIES CO.

Sept. 17, 1919.

[100 S. E. 466.]

1. Pleading (§ 400*)—Waiver of Requirement That Plea Be Sworn to.—In an action of assumpsit on a contract, not to pay money, but to do a collateral thing, if it was necessary that defendant's plea should be sworn to, under Code 1904, § 3286, plaintiff had the right to waive the provision of the statute enacted for his benefit.

[Ed. Note.—For other cases, see 2 Va.-W. Va. Enc. Dig. 58.]

2. Pleading (§ 87*)—Defense to Be Made by Demurrer or Plea and Not by Motion to Dismiss.—In actions at law, where no question is raised as to the validity of the process and its due execution, while the court has jurisdiction of the subject matter and parties, defense can be made only by demurrer or plea, and motion cannot be made to dismiss on the ground there is no liability of defendant to plaintiff.

3. Corporations (§ 514 (2)*)—Motion to Dismiss on Ground Amounting to General Issue Error.—In an action of assumpsit against a coal company for failure to deliver coal according to contract, the court erred in dismissing the action, on motion of an administrator, not a party to the action, for dismissal on the ground that defendant company was not a corporation, etc., a defense amounting to the general issue and which should have been so pleaded.

[Ed. Note.—For other cases, see 2 Va.-W. Va. Enc. Dig. 49.]

4. Assumpsit, Action of (§ 20*)—Matter Amounting to General Issue Must Be Pleaded.—In assumpsit, matter which amounts to the general issue of non assumpsit must be so pleaded.

[Ed. Note.—For other cases, see 2 Va.-W. Va. Enc. Dig. 46.]

5. Corporations (§ 517*)—Affidavit Denying Incorporation with Plea Raising Issue Where Defendant Not Incorporated.—If defendant, sued in assumpsit, as a corporation, desired to contest the fact of its incorporation, and to throw on plaintiff the necessity of proving it, it was necessary, under Code 1904, § 3280, that with the plea putting the matter in issue there should have been an affidavit denying the incorporation.

[Ed. Note.—For other cases, see 3 Va.-W. Va. Enc. Dig. 579.]

6. Pleading (§ 3*)—On Affidavit Denying Defendant's Incorporation, Accompanying Plea Need Not Be Written.—In an action of assumpsit against a corporation, if the affidavit denying the fact of defendant's incorporation accompanied a plea of non assumpsit, it was not necessary that the plea should have been in writing.

[Ed. Note.—For other cases, see 11 Va.-W. Va. Enc. Dig. 216.]

7. Pleading (§ 339*)—Withdrawal of Defendant's Plea on Motion of One Not a Party Error.—In assumpsit against a coal company,

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

the trial court erred in allowing defendant company's plea of non assumpsit to be withdrawn on the motion of an administrator not a party.

Error to Circuit Court, Tazewell County.

Action by Dudley, trading, etc., against the Carter Red Ash Collieries Company. To review judgment of dismissal, plaintiff brings error. Judgment reversed and annulled, and cause remanded with direction.

R. O. Crockett, of Tazewell, and *Jas. S. Kahle*, of Bluefield, W. Va., for plaintiff in error.

CLARK et al. v. REYNOLDS.

Sept. 17, 1919.

[100 S. E. 468.]

1. **Trial (§ 105 (2)*)—Hearsay Testimony, Unobjected to, Good.**
—Hearsay testimony, unobjected to, is good.

[Ed. Note.—For other cases, see 16 Va.-W. Va. Enc. Dig. 632.]

2. **Easements (§ 5*)—Evidence of Right of Way by Prescription.**
—Complainants, in suit to enjoin and restrain defendant from interfering with the use of a private road or right of way through his premises, under the facts held entitled to a right of way by prescription.

[Ed. Note.—For other cases, see 11 Va.-W. Va. Enc. Dig. 309; 11 Va.-W. Va. Enc. Dig. 370.]

3. **Easements (§ 5*)—Prescriptive Right of Way Not Affected by Other Access to Land.**—A prescriptive right in a right of way, implying an original grant, is in no way dependent upon or affected by the fact that there may be other ways of reaching the dominant land.

[Ed. Note.—For other cases, see 11 Va.-W. Va. Enc. Dig. 370.]

4. **Estoppel (§ 78 (3)*)—Violated Contract No Defense in Suit to Enjoin Interference with Right of Way.**—Defendant, in suit to enjoin and restrain interference with complainants' use of a private road or right of way through his premises, cannot defend his position by the terms of a contract regarding the right of way which he himself had disregarded.

5. **Easements (§ 51*)—Use of Right of Way for Other Land Than Agreed.**—A landowner has a right, as owner of an undivided interest in two tracts, served by a right of way over the premises of another, to use of the way in going to and from both of his tracts; but he cannot go out of the limits of the way, nor use it as an easement for the benefit of any other place than that for which it was originally established.

[Ed. Note.—For other cases, see 11 Va.-W. Va. Enc. Dig. 372.]

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.